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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROBERT W. HURLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the allegations of a Section 2255 petitioner that he was incompetent during his trial because of prescription drug (Halcion) induced amnesia which adversely affected his ability to communicate with his lawyer and to testify relevantly raise an important question of federal law which has not been but should be settled by this court?

2. Is it necessary for a post-conviction petitioner claiming prosecutorial use of perjured testimony and falsified documents to allege and prove knowing use, as held by the Eleventh Circuit, or is it sufficient to establish use plus materiality, as held by the Second Circuit?

3. Is the District Court's refusal to grant an evidentiary hearing in the face of allegations of mental incompetence, perjury, false evidence, and ineffective assistance of counsel such a departure from the accepted and usual course of judicial proceedings as to invoke this court's power of supervision?

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

Hurley v. United States, 20 F.3d 1174 (11th Cir. 1994)

STATEMENT OF JURISDICTION

The United States Court of Appeals rendered its opinion on April 14, 1994. The court denied rehearing on May 26, 1994. This court has jurisdiction of this appeal from the denial of a Title 28, Section 2255, motion pursuant to Title 28, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 550

Whoever knowingly and willfully files any false or fraudulent entry or claim for the payment of drawback, allowance, or refund of duties upon the exportation of merchandise, or knowingly or willfully makes or files any false affidavit, abstract, record, certificate, or other document, with a view to securing the payment to himself or others of any drawback, allowance, or refund of duties, on the exportation of merchandise, greater than the legally due thereon, shall be fined not more than $5,000 or imprisoned not more than two years, or both, and such merchandise or the value thereof shall be forfeited.

Title 19, United States Code, Section 1313 (a) and (b)

(a) Upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less

1 per centum of such duties, except that such duties shall not be so refunded upon the exportation of flour or by-products produced from wheat imported after ninety days after June 17, 1930. Where two or more products result from the manuipulation of imported merchandise, the drawback shall be distributed to the several products in accordance with their relative values at the time of separation.

(b) If imported duty-paid merchandise and duty-free or domestic merchandise of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported; but the total amount of drawback allowed upon the exportation of such articles, together with the total amount of drawback allowed in respect of such imported merchandise under any other provisions of law, shall not exceed 99 per centum of the duty paid on such imported merchandise.

Title 28, United States Code, Section 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which

imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

On October 4, 1988, the petitioner ("Hurley") was indicted, with others, for one count of conspiracy and five substantive counts alleging fraud in claiming customs duty drawback under Title 19, Section 1313. (R1 1 1-19). In count one, Hurley was alleged to have violated Title 18 of the United States Code, Section 371, and in counts two through six to have violated Sections 2 and 550, by obtaining duty drawback on the exportation of frozen concentrated pulp wash (FCPW) when the duty was paid on frozen concentrated orange juice (FCOJ). Hurley was acquitted on the conspiracy count and three of the substantive counts, but was convicted on two substantive counts and sentenced to two years' imprisonment on count five and five years' probation, a $100,000 fine, and 800 hours' community service on count six. (R1 132). Hurley has completed his sentence on count five and is now serving his probation as to count six.

Hurley unsuccessfully appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit (No. 89-3240), after which he filed a pro se motion under Title 28, United States Code, Section 2255, on June 13, 1991. (R1 168). The district court's jurisdiction of this post conviction motion following criminal prosecution for alleged violation of federal law was based on Title 28, United States Code, Sections 2255 and 1331. Hurley then secured counsel who filed an amended motion on November 19, 1991, (R1 171) renewed a portion of the pro se motion on January 24, 1992, (R1 174) and supplemented the motion with an affidavit on June 4, 1992. (R1 175). On December 2, 1992, the district court entered an order requiring the government to respond. (R1 180). The government responded on January 19, 1993.

(R1 183). The district court entered its order, which incorporated the government's response, denying Hurley's motion without hearing on February 18, 1993. (R2 184). Hurley filed a motion to alter or amend and for rehearing or new trial on March 1, 1993. (R2 185-186). Both motions were denied on August 31, 1993 (R2 192), and notice of appeal was timely filed thereafter. (R2 193). The Eleventh Circuit subsequently affirmed the District Court without opinion in Appeal No. 93-3128. Hurley filed a motion for rehearing which was denied on May 26, 1994.

At the trial, the government contended that FCOJ and FCPW were two different products and that it was fraudulent to claim drawback on a product described by Hurley as FCOJ when it was really FCPW. The government also theorized that none of the product included in counts five and six was manufactured from FCOJ of a like kind and quality as the product that was imported. The exported FCPW involved in counts five and six was blended or manufactured by companies other than Allsun or Ohio Pure Foods, and the government claimed that Hurley falsely certified that domestic merchandise of the same kind and quality as what was imported was subjected to a qualifying manufacturing process prior to export. (R6 75-82; R13 45-48; Gov't Ex. 5, 6).

Hurley defended against these contentions by arguing that pulpwash was nothing more than diluted orange juice. Under Hurley's theory, when diluted pulpwash was concentrated and frozen, it became FCOJ. Furthermore, Hurley contended that the process used to condense FCOJ and FCPW destroys flavor, and that oil and aroma must be added to all FCOJ and FCPW in the manufacturing process to enhance the flavor. Furthermore, Hurley argued that other companies could perform the manufacturing process for his company. (R1 101; R6 84-100; R10

66-67; R11 126-139; R12 49-50, 63-64, 84-87; R13 82-106; Gov't Ex. 10, Hurley Ex. 85).

The government's first and most important witness at the trial was James Holt. Holt testified that while he was employed at the customs office in Miami, he called Hurley and told Hurley that orange juice and pulpwash were not the same kind and quality items for duty drawback purposes. The testimony was admitted to show that Hurley was given this information and, therefore, knew that FCPW was not of the same kind and quality as FCOJ. (R6 152-56; R8 19-21).

Holt testified that he reviewed a drawback contract which had been submitted by Hurley to the Miami regional office for courtesy review. (R4 18). He said the proposed draft had come to his attention as a result of a review in August, 1978, of an April 7, 1978, letter to Hurley from P.T. Hill, chief of the liquidation branch of the Miami customs office. (R4 21-22). In the letter, Hill told Hurley that his proposed duty drawback statement (or contract) "appears to be satisfactory for submission as you have prepared it. . . . " (Gov't Ex. 1A) Holt testified, "When I saw the letter, I asked to see the contract or drawback statement that was – that was being referred to here." (R4 22). He then identified Government's Exhibit 1B, bearing his notation purportedly written on August 15, 1978, as "the proposed drawback contract which was of Allsun Juices, Allsun Juice Corporation, which was submitted to the Miami regional office for courtesy review." (R4 23). On cross examination, Holt persisted in claiming that he reviewed Government's Exhibit 1B in August when he called Hurley. (R4 83-87).

Throughout his Section 2255 pleadings, Hurley contended that Holt's testimony concerning an alleged conversation with Hurley was false, that Government's

Exhibit 1B was fabricated by Holt, and that the government either knew or should have known that the testimony was false and the exhibit fraudulent. Hurley also contended that he was incompetent to go to trial as the result of taking the prescription drug Halcion which prevented him from remembering that he had in his briefcase a copy of his actual draft of the duty drawback contract. Halcion prevented him from remembering his copy and that Holt's copy was fraudulent and prevented him from discussing it with his lawyer. Furthermore, Hurley consistently complained that his lawyer gave him ineffective assistance of counsel by failing to understand the fraudulent nature of Government's Exhibit 1B and refusing to discuss the matter with Hurley. The false testimony/exhibit, Hurley's incompetence, and his lawyer's ineffectiveness in prohibiting Hurley to discuss Holt's testimony while it was ongoing, Hurley contended in his motion, combined to deny Hurley any chance of a fair trial on the question of guilty knowledge.

In Attachment A to his sworn amended motion (R1 171 8-32), Hurley sets forth the factual bases for his claims of perjured testimony, prescription-drug-induced incompetence to stand trial, and ineffective assistance of counsel. The first sixteen numbered paragraphs list a chronology for the approval of Allsun Juices, Inc.'s duty drawback contract by the customs service. The chronology began at some time before February 10, 1978, when Hurley made contact with the Miami regional office of the customs service concerning an application for duty drawback on behalf of Allsun. On February 10, 1978, Ms. E. Lee LaPierre, drawback liquidator in the Miami customs office, sent a duty drawback application form to Hurley and a memo in which she suggested that Hurley "come to Miami so that we could discuss the various Customs Regulations regarding Drawback and that way

possibly avoid some of the common pitfalls that cause companies to have to amend their Drawback Statement." (Gov't Ex. 12C). The drawback application, which is not the same document as a "drawback statement," was signed by Hurley's co-defendant, Herman Cohen, on February 14, 1978, and returned to Ms. LaPierre. The article manufactured for export for which the drawback application was filed was described as "frozen concentrated orange juice and frozen concentrated orange juice pulpwash." (Gov't Ex. 1J; Gov't Ex. 10, page 23). (R171 8-9).

On February 24, 1978, Holt, using a memorandum form (Government's Ex. 10, page 22) forwarded the application to the Washington headquarters of the customs service. Holt's memorandum does not object to the claim for drawback for exportation of pulpwash. On March 7, 1978, George G. Steuart, chief of the drawback and bonds branch of the United States customs service office in Washington, sent a letter (Gov't's Ex. 11E) to Hurley acknowledging receipt of the drawback application which Steuart described as covering "frozen concentrated orange juice and frozen concentrated orange juice pulpwash." Steuart indicated to Hurley that if Hurley had questions he should call M.L. Tenny at 202-566-5857. (R171 9-10). At some date prior to April 7, 1978, Hurley traveled from Lakeland, Florida, to Miami to seek consultation with Ms. LaPierre. Soon after his trip to Miami, Hurley submitted to the Miami customs office a draft of a drawback statement (sometimes called contract). The draft of the proposed drawback statement consists of seven pages, does not bear a date, and is not signed. The draft of the proposed drawback statement was not introduced at trial. A copy was attached to Hurley's amended motion as Movant's Exhibit 1 and was obtained from Allsun's files. On April 7, 1978, P.T. Hill sent a letter

(Gov't Ex. 1A) to Hurley returning the proposed drawback statement and telling Hurley that the statement "appears to be satisfactory for submission as you have prepared it. . . . " Government Exhibit 1A is an unsigned copy of Hill's letter. Attached to Hurley's amended motion as Movant's Exhibit 2 is a copy of Hill's letter bearing Hill's signature. That copy was originally attached to Movant's Exhibit 1, the first draft of Hurley's proposed drawback statement. (R171 10-11).

On April 10, 1978, Allsun submitted a formal drawback statement to the Washington office of the customs service. Allsun did not send a copy of this statement to Holt or anyone else in the Miami office. Various alleged versions of Allsun's drawback statement were introduced at trial, but neither the actual first statement submitted, nor a copy of it, was ever introduced. Hurley reconstructed that first formal drawback statement and attached it to his amended motion as Movant's Exhibit 3, consisting of pages 1-4 and 7 from Government's Exhibit 11D and pages 5 and 6 from Government's Exhibit 11B. Both 11B and 11D were introduced at trial. (R171 11-12).

At some time on or before August 18, 1978, Hurley called Tenny in the Washington customs office to find out why there had been no ruling on the drawback statement submitted in April and to ascertain what if anything needed to be done to expedite processing. While talking to Tenny on the telephone, Hurley did not want to write on the Allsun file copy of the April 10 drawback statement, so he asked Tenny to hold the line while he made a photocopy. Tenny refused to be put on hold, so Hurley obtained Tenny's telephone number and wrote it in pencil on the first page of Allsun's file copy of the April 10 drawback statement. Allsun's file copy, introduced at trial as Government's Exhibit 11D, contains Hurley's original pencil notation of Tenny's name and telephone number.

Moments after hanging up, Hurley called Tenny again, and Tenny told Hurley that the two columns on the first page of the drawback statement had to be identical and that Hurley should remove from the right-hand column all references to anything other than frozen concentrated orange juice. Hurley and Tenny discussed other changes, and Hurley made notations in ink on the copy that he made after hanging up from his initial telephone conversation with Tenny. The government introduced as its Exhibit 11C a combination of the drawback statement first submitted on April 10, 1978, and substitute pages subsequently submitted. Exhibit 11C contains the original inked changes made by Mr. Hurley while talking to Tenny, and page 1 of Government's 11C is clearly a photocopy insofar as it reflects Hurley's notation of Tenny's name and telephone number, 202-566-5856. This telephone number is different by one digit from the number given to Hurley by Steuart in Government's Exhibit 11E. (R1 171 12-13).

On August 18, 1978, Hurley sent a letter to Tenny asking him to substitute four pages, which the letter said were enclosed, into the April 10 formal version of the drawback statement. Hurley's letter was introduced as the fifth page of Government's Exhibit 10 and as the first page of Government's Exhibit 11B, but nowhere in any of the exhibits taken from the customs office in Miami, the customs office in Washington, or the Allsun files do we find the four substitute pages segregated in such a way that one can identify them with certainty. Following Hurley's letter in Government's Exhibit 10 are eight pages purported to be the drawback statement. Not included in those eight pages, however, is the new page three. Government's Exhibit 10 was taken from the Washington customs office file. Government's Exhibit 11B, taken from Allsun's file, includes an eight-page drawback

statement which appears to be the final version and bears the notation in ink at the top of the first page, "latest copy."

In his amended Section 2255 motion, Hurley set forth nine separate grounds (some of which included multiple parts) for granting him relief. The first ground was that Government's Exhibit 1B was fabricated, false, and fraudulent. Hurley alleged that Exhibit 1B was misrepresented by Holt and the government to be a Miami customs office file copy of Allsun's proposed draft drawback statement. Exhibit 1B bears the following notation by Holt on the first page: "Copy returned to Mr. Hurley, Allsun Juice on 8/15/78. Corrections indicated. J.F.H." Hurley contends this notation is false. On the third page (numbered 3), Holt allegedly scratched from the portion of the drawback statement describing the exported articles on which drawback would be claimed the words "and frozen concentrated orange juice (pulpwash)." (R1 171 13-14).

Hurley set forth in his amended motion (R1 171 14-15), the following facts which establish that Government's Exhibit 1B was false and fraudulent and falsified for the purpose of trial:

1. The actual proposed draft statement (Movant's Exhibit 1) contains only seven pages. Government's Exhibit 1B contains nine pages, none of which were included in Movant's Exhibit 1.

2. The formal drawback statement submitted on April 10, 1978, was submitted to the customs office in Washington and there is no evidence of any kind that that office forwarded the April 10 version to the Miami office. Therefore, Government's Exhibit 1B, which contains pages from the April 10 submission to Washington, could not have come from the Miami customs office and could not have passed through Holt's hands.

3. On the top right hand corner of Government's Exhibit 1B is the notation, clearly photocopied, "Morgan Tenny 8001 (202-566-5856)." This notation was written in pencil on Allsun's file copy of the April 10 submission of the drawback statement when Hurley talked to Tenny on the telephone; therefore, it could not have been on any copy on file in any office of the customs service. Government's Exhibit 11D, taken from Allsun's file, includes the original pencil notation made by Hurley. Hurley contended in his motion, therefore, that it was obvious that the notation made by Holt on Government's Exhibit 1B was made on a copy of a document taken from Allsun's files years after Holt claimed to have made the notation in Miami. The Allsun file copy with Hurley's pencil notation could not have been in any customs service file, especially in 1978.

4. The original April 10 version of the drawback statement consists of seven pages (Movant's Exhibit 3). The final version of the drawback statement, as reflected in Government's Exhibit 11B, contains eight pages and also bears the date of April 10, 1978. Government's Exhibit 1B, the one Hurley contends is fraudulent, contains nine pages, including the first six pages of the original April 10 formal version and pages seven and eight submitted by Hurley on August 18, 1978, three days after Holt's purported notation on the first page of Government's Exhibit 1B.

5. Government's 1B includes two copies of the original page four from April 10. On the first page four in Government's Exhibit 1B is a paragraph from page four of the August 18, 1978, submission. The paragraph, marked "process of manufacture," could not have been in the Miami office on August 15, 1978, when Holt allegedly wrote the note on the first page of 1B, because the new page four containing that paragraph was not prepared by

Hurley and placed in the mail until August 18, 1978. Furthermore, the new pages submitted by Hurley on August 18, 1978, were sent to the customs office in Washington. Therefore, they could not have been in the customs office in Miami on August 15. (R1 171 14-15).

Hurley's amended motion contended that the government knew or should have known of the falsified nature of this document because of the documents which the government seized from Allsun and the documents which were in the files of the Miami branch of the customs service and the Washington customs office. Hurley contended in his motion that Holt had reason to lie about Hurley because (1) Hurley had criticized Holt at a public meeting, (2) Hurley had refused to hire Holt as a consultant after Holt left the customs service, and (3) Holt was a representative of citrus industry interests aligned against uses of pulpwash advocated by Hurley. (R1 171 16). Ground two of Hurley's motion contended that Holt testified falsely and that the government knew or should have known of the falsity of the testimony. (R1 171 16-18)

In ground eight (R1 171 23-25) of his sworn amended motion, Hurley asserted that he was incompetent to stand trial because he was on medication (Halcion) for sleeplessness. As a result of taking Halcion, Hurley was unable to recall certain important facts, to relate those facts to his attorney, and to testify relevantly about those facts. Hurley set forth the following specific facts with regard to his inability to confer with his attorney and testify relevantly:

1. When Holt testified falsely about his alleged review of the proposed draft statement submitted for informal review to the Miami office, Hurley remembered that the proposed draft statement was different from the document authenticated by Holt and introduced as Government's Exhibit 1B. Because his lawyer refused to allow

him to speak during the trial, Hurley was unable to tell his lawyer what he recalled at the time. By the time Holt's testimony had ended, Hurley, because of the Halcion, had forgotten Holt's testimony, the existence of Movant's Exhibits 1 and 2, the facts and circumstances which would have contradicted Holt, and the differences between the nine-page document introduced as Government's Exhibit 1B and (1) the first proposed draft statement, (2) the April 10 formal version of the statement, and (3) the amendment submitted in August.

2. On February 14, 1989, Hurley testified at trial. That morning, before trial, Hurley remembered the proposed draft statement and obtained by facsimile a partial copy for use in his testimony that day. Although he had the exhibit in his briefcase during his testimony, he forgot about its existence. A copy of the fax copy is attached to Hurley's motion as Movant's Exhibit 7.

3. During Tenny's testimony, Hurley was aware of Movant's Exhibit 4, showing Tenny's involvement in the "pulpwash" approval process. In fact, at the time the document was included in Government's Exhibit 10 in a so-called jury book provided by the government to Hurley's trial counsel which was on defense counsel table. However, while Tenny testified Hurley forgot about Movant's Exhibit 3 and that it would contradict Tenny's testimony. His memory failure was a result of his use of Halcion.

Hurley set forth in his amended motion that he had seen a psychiatrist who would testify at an evidentiary hearing that memory loss such as that described by Hurley is a documented side effect of Halcion, and that, if Hurley's testimony is credited, the use of Halcion had a negative effect on Hurley's ability during trial to confer with and assist his attorney and to testify relevantly. (R1 171 23-25). Hurley's memorandum in support of his

motion (R1 173) includes as attachments two medical journal articles describing the memory impairment resulting from use of Halcion.

As ground nine of his amended motion, (R1 171 25-31) Hurley claimed his trial counsel was guilty of ineffective assistance of counsel in the following ways:

1. He refused to communicate with Hurley during the trial.

2. He failed adequately to engage in discovery. As a result, he never understood the relationships among the various versions of the drawback statement and was unable, and failed, to cross-examine Holt effectively.

3. Before trial, Hurley pointed out to him the importance of Movant's Exhibits 1 and 2 and obtained copies for himself and his lawyer from Allsun's attorney. Later, Hurley asked the lawyer about Movant's Exhibits 1 and 2, and the lawyer could not locate his copies. Hurley gave the lawyer his own copies. On the morning before Hurley's testimony, Hurley again recalled Movant's Exhibits 1 and 2 and asked his attorney about them; his attorney had misplaced Hurley's copies as well. That morning, Hurley obtained a partial copy of exhibit 2 by telefascimile from James Kynes, the attorney for Allsun, just minutes before court convened for the morning. Attached to Hurley's motion as Movant's Exhibit 7 is a copy of Allsun's file copy of Hill's April 7 letter and the first four pages of the proposed drawback statement referred to in the letter. The telefax identification of James Kynes and the date and time of transmission, which coincide with the date and time of Hurley's testimony, appear on the face of Movant's Exhibit 7. It was this copy of the proposed drawback statement which was in Hurley's briefcase when he testified but which he was unable to recall because of Halcion, and which his lawyer did not understand well enough to ask him about.

4. Although he was aware of a witness's proposed testimony, the lawyer failed to call him to testify about his knowledge of a conspiracy among others (including a Steve Harris) to obtain drawbacks they knew to be illegal. This testimony would have aided in attacking the credibility of Steve Harris, a prosecution witness.

5. His laywer failed adequately to cross-examine Harris.

6. Although the attorney's associate had contacted a USDA official before trial who would have testified that USDA grading standards do not apply to pulpwash but that, instead, the Florida Citrus Code is used to "grade" both pulpwash and imported orange juice concentrate, the attorney failed to offer such testimony in Hurley's defense.

7. The lawyer failed to clarify for the jury to what extent and by what standards imported FCOJ and FCPW are graded. The attorney had under subpoena at trial Charles Criss, a professional administrator of a citrus processing factory, who was prepared to testify that FCOJ imported directly into the state of Florida from a foreign producer is not graded as grade A, grade B, or substandard, as government witnesses testified.

8. The lawyer failed adequately to cross-examine customs agent Bowman concerning USDA scoresheets which did not in fact exist.

9. The lawyer failed adequately to cross-examine Ms. Pinner concerning her claim that pulpwash is spat out because it is bitter, and the falsity of her testimony that pulpwash is not graded. Hurley had made available to his lawyer before trial all the information necessary to cross-examine Pinner in this regard.

10. The lawyer failed in several regards concerning the right of an exporter to claim drawback for product manufactured by someone else.

11. The lawyer failed to understand, prepare for, and present a defense based upon Hurley's good faith belief that pulpwash was in fact the same kind and quality as imported frozen concentrated orange juice. The lawyer could have cross-examined the government's witnesses and presented available defense witnesses to elicit testimony which would have established that neither imported frozen concentrated orange juice nor pulpwash is graded by USDA grade A, etc. standards; that both are graded, "meets Florida Citrus Code of 1949, as amended," and are, therefore, of like kind and quality under the Florida citrus code; that both products are extracted from oranges and are, therefore, under an *eo nomine* theory, of like kind and quality; that there are major orange juice companies that believe that pulpwash and concentrated orange juice are sufficiently of like kind and quality that any distinction between them should be removed; that to distinguish pulpwash from other concentrated orange juice, the Florida Citrus Department requires the addition of sodium benzoate to the pulpwash; and that other American states that produce orange juice do not distinguish between pulpwash and concentrated orange juice. Ground nine of Hurley's motion contended that all of this information, if presented by Hurley's trial counsel, would have established that either (1) frozen concentrated orange juice and pulpwash are legally of "like kind and quality" or, (2) Hurley had the good faith belief that the two products were of like kind and quality and he could, therefore, legally receive drawback for exporting pulpwash.

12. The lawyer also failed to demonstrate to the jury how pulpwash is produced although he had available in the courtroom the equipment and the oranges and other materials for such a demonstration. This demonstration

would have allowed the jury to see the source of pulpwash and the similarity between it and other orange juice.

13. The lawyer failed to introduce evidence that, under Government's Exhibit 12D, drawback could be allowed even though the exported articles are not of the same kind and quality as the articles which were manufactured or produced with the use of the designated merchandise provided such exported articles were manufactured or produced with the use of merchandise of the same kind and quality as the designated merchandise. Witnesses were readily available and could have and would have explained that orange juice, no matter how obtained from the orange, follows a routine path through a machine called an evaporator. This evaporator converts the orange juice into concentrated orange juice for manufacturing (COJM) as soon as it reaches a concentration level of twenty degrees Brix and from that point proceeds through other stages, changing the product into a new and different item at least four times within the evaporator. The completed product is then blended with other ingredients to enhance flavor and bouquet (aroma) or increase shelf-life and flavor (cold pressed oil). This evidence would have established that at some point in the process, pulpwash became of like kind and quality as the imported concentrated orange juice and that the continued processing met the "manufacturing" requirement for drawback. Alternatively, this evidence would have established Hurley's good faith belief that drawback was available for export of concentrate from pulpwash. (R1 171 25-31).

Hurley later supplemented his motion with an affidavit and documents (R1 175) which show unequivocally that the Florida Department of Citrus standards for frozen concentrated orange juice are more stringent than the

Food and Drug Administration's standards. In spite of the more stringent Florida regulations, at the time of Hurley's alleged offense, it was legal for someone to import into Florida from another state or elsewhere FCOJ containing pulpwash. Accordingly, the supplement to Hurley's motion contended that the entire theory of the government's prosecution was erroneous and that his attorney, by failure to acquaint himself with the facts and theories involved, was guilty of ineffective assistance of counsel. (R1 175).

ARGUMENT

Question 1: Do the allegations of a Section 2255 petitioner that he was incompetent during his trial because of prescription drug (Halcion) induced amnesia which adversely affected his ability to communicate with his lawyer and to testify relevantly raise an important question of federal law which has not been but should be settled by this court?

Hurley's motions contended that he was not competent to stand trial because of the effects of the prescription drug, Halcion. According to his allegations, during the pretrial stage of the case he sometimes remembered about the true copy of the proposed draft of the drawback statement and he specifically remembered it during Holt's testimony. Unfortunately, he forgot about the true copy at most other times. He actually forgot about it between the times that Holt testified about it and the time Holt left the stand. He happened to remember it on the morning he was to testify, and he obtained a copy of the first few pages of the true draft moments before he was to take the stand (see Movant's Exhibit 7). Unfortunately, he promptly forgot that he had it with him in court and did not remember it again until after the trial.

Hurley's motion also contended that during the trial he forgot facts and documents which would have impeached the credibility of another witness, M.L. Tenny. Furthermore, the transcript of Hurley's testimony during trial reflects an irritable, agitated and sarcastic individual who no doubt made that impression on the jury. Both his memory loss and his unpleasant personality quirks while testifying were the products of Halcion.

A controversy about Halcion has raged in the media and in the courts for the last several years. *E.g., Williams v. Upjohn Co.*, 153 F.R.D. 110 (S.D. Tex. 1994); *Briggs v. Upjohn Co.*, 503 N.W. 2d 695 (Mich. app. 1993); *Ballan v. Upjohn Co.*, 814 Supp. 1375 (W.D. Mich. 1992); *Grunberg v. Upjohn Co.*, 140 F.R.D. 459 (D. Utah 1991); *Grunberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991); "Upjohn and Halcion – an ongoing pattern of misconduct," SCRIP World Pharmaceutical News 6 (May 3, 1994); "Memo suggests Upjohn concealed Halcion side effects," 308 British Med. J. 677 (March 12, 1994); "Common drugs that can kill you," McCall's 98 (May 1994), ("Halcion is believed to cause short-term memory loss, the worsening of depression and suicidal behavior. For safety reasons regulators in Great Britain ordered a permanent ban last year."); "Halcion and other sleeping pills, "8 U. of Cal. Wellness Letter 3 (July 1992) ("Halcion under fire for causing serious psychiatric side effects."); "Fueling the fire over Halcion: Upjohn's own staff has raised safety concerns," Newsweek 84 (May 25, 1992); "Under a cloud," 37 People Weekly 125 (May 11, 1992) ("The sleeping pill Halcion is prescribed more often than any other sleep aid. Side effects of a high dosage of the pill might include a reduction of inhibitions and memory lapses, according to Psychiatrist Stuart Yudofsky."). Some of these articles were submitted to the trial court. (R 173 18-24).

It is clear from the publications that Halcion causes anterograde amnesia and episodes of agitation, both of which Hurley experienced during his trial. "Anterograde amnesia" is defined in Campbell, R., *Psychiatric Dictionary* 34 (6th Ed.) as the "inability to form new memories, either because of failure to consolidate what is perceived into permanent memory storage, or because of inability to retrieve memory from storage." Examples are set forth in the article in the record at R1 173 20, including a lecturer who took Halcion the night before a lecture and although he gave a good lecture, he had no memory of giving it. Another example is a bank customer who could not remember a "pin" code but knew it twenty-four hours earlier and remembered it forty-eight hours later. These examples and the definition of anterograde amnesia are exactly like Hurley's memory failures during trial as described in his motion.

The test for determining whether a defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403 (1960). "Under this standard the sole consideration is whether a habeas petitioner had the present mental ability meaningfully to participate in his defense." *Johnson v. Estelle*, 704 F.2d 323 (5th Cir. 1983). "Convicting a defendant when he lacks the capacity to understand the proceedings against him, consult with his counsel, and assist in the preparation of his defense, is fundamental error." *Nix v. United States*, 955 F.2d 161 (2nd Cir. 1992).

The significance of a post conviction claim of incompetence at trial was set forth by the old Fifth Circuit before the creation of the Eleventh Circuit, as follows:

> When a prisoner, either state or federal, seeking post conviction relief asserts with substantial

> facts to back up his allegation that at the time of the trial he was not mentally competent to stand trial, and that there was no resolution of that precise issue before he was tried, convicted, and sentenced, that protection of the Fourteenth Amendment to the Constitution requires that such conviction and sentence be set aside unless upon adequate hearing it is shown that he was mentally competent to stand trial.

Lee v. Alabama, 386 F.2d 97, 105 (5th Cir. 1957).

Although post-conviction claims by defendants that they were incompetent due to drug-taking (particularly during guilty pleas) are common, no real standards have been established for governing those claims, particularly when the claim relates to amnesia. The Eleventh Circuit has established some guidelines governing amnesia, although not drug-induced or claimed post-conviction. Under the Eleventh Circuit's conception, "For an amnesiac (or any other impaired defendant) to stand trial, consistent with motions of due process, he must be able to satisfy the ordinary competency standards . . . " *United States v. Rinchack*, 820 F.2d 1557, 1569 (11th Cir. 1987). The court established the following guidelines:

> In applying this standard to an amnesiac defendant, the court should evaluate the nature and extent of the defendant's impairment and determine its impact on the following factors: (1). The defendant's ability to take the stand and to testify and otherwise participate in his defense; (2). Whether the amnesia is temporary or permanent; (3). Whether the time and the defendant's whereabouts can be properly reconstructed without the defendant's testimony, including any facts given rise to a defense; (4). Whether access to government's files would aid in preparing for trial; (5). The strength of the government's case against the defendant.

Id. at 1569.

Whether the *Rinchack* standard or some other standard applies to drug-induced amnesia in a post-conviction claim is an issue which has not been decided by this court. The issue clearly arises under the due process clause of the Fifth Amendment, *Dusky*, and other cases. Given the tendency of defendants to make post-conviction claims of drug-induced problems at their pleas or during their trials, and given the widespread use and documented side effects of Halcion and other drugs, the question of what guidelines a court should follow in evaluating such a claim is an issue of federal law which has not been, but should be decided by this court.

Question 2: Is it necessary for a post-conviction petitioner claiming prosecutorial use of perjured testimony and falsified documents to allege and prove knowing use, as held by the Eleventh Circuit, or is it sufficient to establish use plus materiality, as held by the Second Circuit?

The court should exercise its jurisdiction to resolve a conflict between the decisions of the Second Circuit and the Eleventh Circuit on the question of whether it is necessary for a post-conviction claim of perjured testimony or false evidence to establish knowledge of the falsity on the part of the government. The decisions of the Eleventh Circuit seem to establish a very rigid standard in false-evidence and perjury cases. As the government's response to Hurley's Section 2255 motion states, "only knowing use of perjured testimony or false evidence constitutes a violation of due process. *Jacobs v. Singletary*, 952 F.2d 1282, 1287 n.3 (11th Cir. 1992); *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984) *cert. denied*, 470 U.S. 1087 (1985); *United States v. Gibbs*, 662 F.2d 728 (11th Cir. 1981)." (R1 183 2). It will be recalled that the district court incorporated the government's response into its order denying Hurley's Section 2255 motion without hearing.

The Second Circuit has made an express departure from this austere rule. *Sanders v. Sullivan*, 863 F.2d 218 (2nd Cir. 1988). The Second Circuit's rationale was well summarized in *United States v. Wallach*, 935 F.2d 445, 456 (2nd Cir. 1991), as follows:

> Whether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent which the prosecution was aware of the perjury. With respect to this latter inquiry, there are two discreet standards of review that are utilized. Where the prosecution knew or should have known of the perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Perkins v. LeFevre, 691 F.2d 616, 619 (2nd Cir. 1982) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). See also Sanders v. Sullivan, 863 F.2d 218, 225 (2nd Cir. 1988) (question is whether the jury's verdict "might" be altered); Annunziato v. Manson, 566 F.2d 410, 414 (2nd Cir. 1977). Indeed, if it established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2nd Cir. 1975) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), cert. denied 429 U.S. 819, 97 S. Ct. 66, 50 L.Ed.2d 80, (1976). Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." Sanders, 863 F.2d at 226; see also United States v. Seijo, 514 F.2d 1357, 1364 (2nd Cir. 1975) (the test " 'is whether there was a significant chance that this added item, developed by

> skilled counsel . . . could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.' " (other citations omitted).

Thus there is a conflict between the Eleventh Circuit standard as applied in this case (requiring prosecutorial knowledge of falsity) and the Second Circuit standard (authorizing a new trial even without prosecutorial awareness if the falsity was material). See, also, *United States v. Biberfield*, 957 F.2d 98 (3rd Cir. 1992). This court should grant certiorari in this case to resolve this conflict.

Question 3: Is the District Court's refusal to grant an evidentiary hearing in the face of allegations of mental incompetence, perjury, false evidence, and ineffective assistance of counsel such a departure from the accepted and usual course of judicial proceedings as to invoke this court's power of supervision?

In its order denying Hurley's motion, the district court stated that it found that "the motions, files and records in this case conclusively show that the movant is entitled to no relief." (R1 184). The order went on to incorporate the government's response to Hurley's motion. In its order denying rehearing, the court stated, "The Fifth Circuit has held, however, that a District Court can properly rely on the government's response, along with the Court's records, to dispose of allegations contained in a section 2255 motion without a hearing." (R1 192). In support of this statement, the court cited *Franklin v. United States*, 589 F.2d 192 (5th Cir. 1979). Nowhere in either order is any further explanation for the court's holdings.

It may be, as the district court held, that *Franklin* authorizes the court's reliance on the government's response to Hurley's motion. But *Franklin* does not excuse

the district court from finding *conclusively* that the facts alleged by Hurley, if taken as true, would present no ground for relief. *United States v. Yizar*, 956 F.2d 230 (11th Cir. 1992). Nor does *Franklin* excuse what even the government acknowledges is the "preferred practice" for the district court to "enumerate the issues raised by the movant, specify that each is being summarily dismissed in accordance with the rule, and explain the legal grounds for that action." (R2 188).

"Where, as here, the allegations in the § 2255 motion are not negated by the record, the district court must hold an evidentiary hearing to 'decide all of these unresolved factual allegations which, if true, might support [his] constitutional claim . . . ' " *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991), quoting *Friedman v. United States*, 588 F.2d 1010 (5th Cir. 1979). As should be apparent from the allegations of Hurley's motion as summarized in the above statement of facts, there are many "unresolved factual allegations which, if true, might support" Hurley's claim.

A panel of the United States Court of Appeals for the District of Columbia Circuit, including then Judge Ruth Bader Ginsburg, stated the rules applicable to a case such as Hurley's as follows:

> A district judge must grant a prompt hearing under § 2255 unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. The decision whether to do so is committed to the district court's discretion. . . . In making this decision, "the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion"; indeed his ability to do so is one of the advantages of § 2255 relative to *habeas corpus* for state prisoners. *Blackledge v. Allison*, 431 U.S. 63, 74 n. 4, 97 S.Ct. 1621, 1629 n. 4 (1977). Only where the § 2255 motion raises

> "detailed and specific" factual allegations whose resolution requires information outside of the record or the judge's "personal knowledge or recollection," must a hearing be held. *Machibroda v. United States*, 368 U.S. 487, 495, 82 S.Ct. 510, 514 (1962). Even if the files and records of the case do not clearly rebut the allegations of the prisoner, no hearing is required where his claims are "vague, conclusory, or palpably incredible." *Id.*

Hurley's motion raises "detailed and specific factual allegations whose resolution requires information outside of the record or the judge's personal knowledge," and his claims are not "vague, conclusory, or palpably incredible." With regard to the incompetence issue, the old Fifth Circuit has held that a post-conviction claim of incompetence to stand trial requires the trial court to decide whether it can conduct an adequate hearing on the question of the defendant's competency to stand trial at the time of the trial. If it cannot, "it will be under the obligation to set aside the judgment of conviction . . . " *Lee v. Alabama*, 386 F.2d at 108. This duty the trial court failed to perform. Hurley had an absolute right to be mentally competent at the time of his trial. His motion alleges incompetence to remember what witnesses said against him, to recall proof available to refute the witnesses, to remember to talk to his lawyer about what witnesses said and to remember to testify about such things as the true exhibit in his briefcase. The issue of competence is not subject to a cause and prejudice analysis. *Adams v. Wainwright*, 764 F.2d 1365, 1359 (11th Cir. 1985).

It is not conceivable that a person who claims to have been incompetent during the trial and thus did not do certain things can be denied a hearing on the issue for the reason that the files and records show he is not entitled to relief. The files and records cannot show what went on within the petitioner's mind and body during the trial.

The files and records cannot show what the petitioner forgot. And the trial judge's recollections are of no persuasiveness on this issue either. At no time did the trial judge ever see Hurley when he was not under the influence of Halcion. Therefore, the judge has no knowledge of Hurley's "normal" demeanor, attitude, or abilities to recall prior activities. The judge below cannot possibly compare Hurley's Halcion-induced condition with normalcy, when the judge has not observed Hurley in a normal state. It is, therefore, impossible for the judge below to conclude that Hurley was operating with his full mental capacities, and such a conclusion is necessary before the trial judge can dismiss Hurley's claim of incompetence due to ingestion of prescription medication.

The only conceivably legal grounds for denying an evidentiary hearing on the false evidence issue is that the district court relied upon the Eleventh Circuit standard requiring prosecutorial knowledge of the falsity. Even using this rationale, the trial court would have had to accept the prosecutor's unsworn denial of knowledge. Hurley's explanation of the origins and developments of the real drawback statements establish beyond question that the document Holt identified in court was an amalgamation of documents, some parts of which could not have been available to Holt on the date he testified he made a note to Hurley telling him drawback could not be obtained on pulp wash. It was a gross departure from the norms of proceedings in Section 2255 matters for the district court to deny a hearing, first on the issue of the government's knowledge of the falsity, and second on Hurley's claims of false testimony and exhibits.

On the question of ineffective assistance of counsel, Hurley set forth factual allegations showing that his trial

counsel failed to understand the significance of the fabricated document authenticated by Holt, refused to listen to Hurley when Hurley attempted to explain the falsity, lost his own copy of the true document and in many other ways failed to prepare and adequately understand the case. Of great importance, is the fact that a better understanding of the facts and circumstances of the case would have enabled trial counsel to argue cogently that the export of frozen concentrated pulp wash entitled Hurley to claim duty drawback or at least to believe that such claims were possible.

CONCLUSION

A writ of certiorari should issue.

Respectfully submitted,

ROBERT L. DOYEL
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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

(Filed Feb. 18, 1993)

UNITED STATES OF AMERICA

v.

ROBERT W. HURLEY

Case No.
88-331-CR-T-15(A)
91-739-CIV-T-(15)(A)

ORDER

Before the Court is Robert W. Hurley's ("movant") motion and supplements pursuant to 28 U.S.C. § 2255 (D-173, D-174 & D-175).

For the reasons set forth in the government's response to the movant's motion and supplements pursuant to 28 U.S.C. § 2255 (D-183), the Court finds that the motions, files and records in this case conclusively show that the movant is entitled to no relief.

Accordingly, it is ORDERED:

1) That the government's response to the movant's motion and supplements pursuant to 28 U.S.C. § 2255 (D-183) is hereby incorporated in this Order by reference.

2) That the movant's motion and supplements pursuant to 28 U.S.C. § 2255 are DENIED.

DONE AND ORDERED at Tampa, Florida this *18th* day of February, 1993.

William Castagna
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT
JUDGE

Copies to
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

ROBERT W. HURLEY

Case No.
91-739-CIV-T-(15)(B)
88-331-CR-T-15(B)

ORDER

Before the Court are the petitioner's motions "to alter or amend order denying section 2255 motion" (D-185) and "for rehearing or new trial on order denying [petitioner's] section 2255 motion." (D-186)

Petitioner's motion for rehearing or new trial on order denying [petitioner's] section 2255 motion (D-186) is merely an attempt to reargue issues already decided by this Court. The motion is therefore denied.

The Court will construe petitioner's motion to alter or amend order denying section 2255 motion (D-185) as a motion for reconsideration of this Court's Order dated February 18, 1993, (D-184). The thrust of the petitioner's argument is that this Court erred in denying petitioner's section 2255 motion to the extent that the Court relied upon the government's response (D-188). The Fifth Circuit has held, however, that a District Court can properly rely on the government's response, along with the Court's records, to dispose of allegations contained in a section 2255 motion without a hearing. *See, e.g., Franklin v. United States*, 589 F.2d 192, 193 (1979), *cert. denied*, 441 U.S. 948. Furthermore, the Court held, independent of

that ruling, "that the motions, files and records in this case conclusively show[ed] that the movant [was] entitled to no relief."

Accordingly, it is ORDERED:

1) That the petitioner's motion for rehearing or new trial on order denying [petitioner's] section 2255 motion (D-186) is DENIED.

2) That the petitioner's motion to alter or amend order denying section 2255 motion (D-185) is DENIED.

DONE AND ORDERED at Tampa, Florida this 31st day of August, 1993.

William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3128
Non-Argument Calendar

D.C. Docket No. 91-739-Civ-T-15B
and 88-331-Cr-T-15

ROBERT W. HURLEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appelle [sic].

Appeal from the United States District Court
for the Middle District of Florida

(April 14, 1994)

Before COX and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM: AFFIRMED: See 11th Cir. Rule 36-1.

Judgement Entered: April 14, 1994.
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: June 20, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3128

ROBERT W. HURLEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appelle [sic].

On Appeal from the United States District Court
of the Middle District of Florida

ON PETITION FOR REHEARING

(Filed May 26, 1994)

BEFORE: COX AND CARNES, Circuit Judges and FAY, Senior Circuit Judge.

PER CURIAM: The petition for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

Emmett R. Cox
United States Circuit Judge